



# INDIGENOUS PROTECTION MECHANISMS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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## **1. The components of the Inter-American Human Rights System (IAHRS)<sup>1\*</sup> .**

The ISHR has two components: normative and institutional. The normative component is made up of conventional norms with which States are obligated to comply and non-conventional norms that do not officially bind States, but influence their practice. Some non-conventional norms are the American Declaration of the Rights and Duties of Man and the American Declaration on the Rights of Indigenous Peoples. Some conventional norms are the American Convention of 1969 and its two additional protocols, one on Economic, Social and Cultural Rights and the other on the Abolition of the Death Penalty, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

The institutional component consists of the Inter-American Commission of Human Rights (IACHR), created in 1959 under the OAS Charter (Article 53 and Article 33 of the American Convention), and the Inter-American Court of Human Rights, created in 1969 under the American Convention (Article 33). Both bodies are composed of seven people who act independently and must be of high moral authority and recognized competence in the field of human rights. The members of the IACHR are elected by the OAS General Assembly and have a 4-year term with the possibility of being re-elected once; and the members of the IACHR Court are elected by the States Parties to the American Convention and have a 6-year term with the possibility of being re-elected once.

## **2. The Inter-American Commission on Human Rights (IACHR).**

The IACHR is the body specialized in the protection and promotion of human rights in the Americas and has jurisdiction over all OAS Member States that it

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<sup>1\*</sup> This text is based on the following books: Mejía Rivera, J. A. (2024). *La implementación de las sentencias de la Corte Interamericana de Derechos Humanos en México, Centroamérica y Panamá con una mirada de género*. Mexico: Tirant lo Blanch (in press); Mejía Rivera, J. A. (2015). *Elementos para una teoría de los derechos económicos, sociales y culturales desde el Sistema Interamericano de Derechos Humanos*. Mexico: Inter-American Institute of Human Rights. Centro de Estudios de Actualización en Derecho. Editorial UBIJUS; and Mejía Rivera, J. A. (2010). *Honduras y los sistemas internacionales de protección de derechos humanos*. Tegucigalpa: Editorial San Ignacio.

oversees based on the American Declaration on the Rights and Duties of Man and the American Convention if they are States that have ratified it.

### **2.1. Monitoring-consultative function.**

As part of this function, the IACHR carries out, among others, the following actions: first, within the framework of its sessions, it promotes, without petition or at the request of an interested party, public or private spaces for dialogue between the IACHR, the users of the ISHR, civil society and the American States. The main objective is to generate updated information for the IACHR on specific human rights issues in a country or group of countries, petitions or precautionary measures. In this sense, these spaces allow the IACHR to receive first-hand information on specific issues raised by civil society and the States to report on the measures they have adopted and will adopt to resolve the situations indicated.

Second, it conducts *on-site* visits, which are one of the main mechanisms for monitoring the human rights situation in the Americas. During the visit, the IACHR is free to meet with all the actors it deems appropriate, from State authorities to civil society organizations and victims and their families, and the State has the obligation to provide the facilities and security measures necessary for the IACHR to carry out its activities without inconvenience, and to obtain first-hand information relevant to human rights. Undoubtedly, the role of civil society is fundamental in providing the IACHR with relevant information and even recommending that it address certain issues, visit certain places and hold meetings with certain actors. At the end of its visit, the IACHR holds a press conference and issues a press release with an annex of preliminary observations. Subsequently, the IACHR publishes a special report with recommendations, which constitutes a complete diagnosis of the human rights situation in the country visited.

Third, it establishes rapporteurships to follow up on specific rights, populations or situations. In this sense, there are two types of rapporteurships: country rapporteurships and mandates linked to the fulfillment of the IACHR's functions. With respect to the country rapporteurships, the IACHR designates its members

as responsible for each OAS member state and they exercise the responsibilities assigned to them by the IACHR. Each commissioner is responsible for one or more countries. And in relation to the rapporteurships linked to the fulfillment of the functions of the IACHR, these may function as thematic rapporteurships, headed by a commissioner of the IACHR, or as special rapporteurships, headed by other independent experts appointed by the IACHR, as is the case of the Special Rapporteurship for Freedom of Expression and the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights.

One of the essential functions of the rapporteurships is to bring to the attention of the IACHR issues of special interest or serious concern in the area of human rights; undoubtedly, they require the cooperation of the States in order to effectively fulfill their mandates. There are currently 13 rapporteurships. The Rapporteurship on the Rights of Indigenous Peoples was the first created in 1990 with the following mandate: (a) to promote the development, advancement and consolidation of inter-American standards on the rights of indigenous peoples, and to facilitate their access to the IAHRs; (b) to participate in the analysis of individual petitions and requests for precautionary measures related to indigenous peoples; (c) to support *in loco* visits; (d) to prepare thematic reports on the subject; and (e) to organize and participate in academic and informative events with representatives of the State, civil society and indigenous peoples.

## **2.2. Contentious function**

The IACHR has three tools to exercise this function: The first tool is the submission of individual petitions containing allegations or complaints of human rights violations. The requirements that must be fulfilled in order to file one are: (a) that the remedies under domestic jurisdiction have been filed and exhausted, unless there is no due process of law for the protection of the rights violated, access to such remedies has not been allowed or is prevented from being exhausted, or there is an unwarranted delay in the decision on such remedies; (b) that it is filed within 6 months from the date on which the alleged injured party's rights have been notified of the final decision; (c) the case has not been previously resolved by the IACHR nor is it pending in another international instance of a similar nature; and (d) the petition contains the name, nationality, profession,

domicile and signature of the person or persons or of the legal representative of the entity submitting the petition.

The contentious procedure is divided into four procedural stages. The first is the initial review stage, which is the responsibility of the Executive Secretariat, which analyzes whether the petitions submitted meet all the requirements. The petitions that pass this first stage are notified to the denounced State, thus initiating the second stage, that is, the admissibility stage, which ends with the adoption of an admissibility or inadmissibility report. Cases that are admitted proceed to the third stage, the merits stage, which culminates with the adoption of the so-called "merits report" after the parties present their arguments and the IACHR considers that it has sufficient information to make a decision in which it determines whether or not the State is responsible for the commission of the human rights violations alleged in the initial petition. This report is confidential and is transmitted to the State and gives it a deadline to remedy the situation denounced.

If the IACHR considers that the State has not complied with such recommendations, it has two options: to publish its decision in the annual report or to submit the case to the IACHR Court. With respect to the first option, the IACHR will follow up on the State's compliance with its recommendations; and with respect to the second option, it is not a discretionary decision, but must consider the alternative that is most favorable for the protection of the rights established in the Convention and take into account the position of the petitioning party, the nature and gravity of the violation, the need to develop or clarify inter-American jurisprudence, and the eventual effect of the decision on the legal systems of the OAS member states.

If within three months of the transmission of the report to the State, the matter has not been resolved or, in the case of States that have accepted the jurisdiction of the IACHR Court, has not been submitted to the Court's decision, the IACHR may publish the report. In this sense, the fourth procedural stage is the submission of the case before the IACHR Court or the publication of the merits report. It is important to emphasize that at any stage of the process the IACHR may make itself available to the parties on its own initiative or at the request of

any of them in order to reach a friendly settlement before issuing its own conclusions and recommendations, or before arriving at more forceful solutions. If a friendly settlement is reached, the IACHR shall approve and publish a report with a brief statement of the facts and the settlement reached. If the State does not comply with the agreement, the IACHR may be requested to continue with the study of the merits of the case.

The second tool is the request for precautionary measures, which seek to protect people or groups of people in a serious and urgent situation, when there is a risk of irreparable harm to their rights. In this sense, the IACHR may issue precautionary measures in a case involving serious and urgent situations that represent a risk of irreparable harm to persons or groups of persons. This request must incorporate a series of informative elements: first, the identification of the beneficiary persons, which may be persons or groups of persons determined or determinable through their geographic location or their belonging or link to a group, people, community or organization. Thus, the IACHR has granted precautionary measures in favor of members of indigenous peoples, social organizations, persons deprived of liberty, migrants, members of peasant organizations or inhabitants of rural communities.

Secondly, complaints filed internally, which does not mean that there is a requirement to exhaust domestic remedies for their presentation, but rather that consideration is given to whether the situation of risk has been reported to the corresponding authorities or the reasons why it has not been done. The importance of the complaints is that it allows the IACHR to assess whether the State has adopted any protection measure and whether it is suitable and effective to mitigate the situation of risk. In the event that it has not been adopted or if it was adopted, the measure is not suitable or effective, the intervention of the IACHR through a precautionary measure is more imperative. Third, the requirements of gravity, urgency and irreparability must be met. Seriousness "means the serious impact that an action or omission may have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American System." Urgency "is determined by information indicating that the risk or threat is imminent and may materialize, thus requiring preventive or protective action". Irreparability "means the affectation of rights

which, by their very nature, are not susceptible to reparation, restoration or adequate compensation".

And the third tool is Article 41 of the American Convention which, in its paragraph d), establishes that the IACHR "has the principal function of promoting the observance and defense of human rights, and in the exercise of its mandate" may "request the governments of the member states to provide it with reports on the measures they adopt in the area of human rights". The Article 41 Charter has a two-fold impact because, on the one hand, it allows States to identify a situation or matter that violates human rights and may compromise their international responsibility if the necessary measures are not adopted to reverse it and, on the other hand, it allows the IACHR to know the position of the State and the measures it has adopted, and to make an objective evaluation of the situation denounced.

### **3. The Inter-American Court of Human Rights (IACHR).**

The IACHR Court monitors compliance with the obligations assumed by the States in the framework of inter-American human rights norms and is competent to examine the States that have ratified the American Convention and that have declared that they recognize its jurisdiction as compulsory.

#### **3.1. The advisory function.**

Through its advisory function, the Inter-American Court responds to consultations formulated by the OAS Member States and the bodies listed in Chapter X of the OAS Charter, as amended by the Protocol of Buenos Aires, that is, the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the IACHR, the General Secretariat, the Specialized Conferences and the Specialized Agencies. The answers given by the IACHR Court to these consultations are called Advisory Opinions, which do not have the character of a judgment, since there are no parties involved in an adversarial process and no judicial sanction is foreseen. Nevertheless, these opinions represent an unavoidable guide for the application of the American Convention and contribute to the fulfillment of the State's human rights obligations. The central purpose of the advisory function is

to obtain a judicial interpretation of one or more provisions of the Convention or of other treaties concerning the protection of human rights. To date, the IACHR has published 29 Advisory Opinions on a variety of topics, such as the legal status and human rights of children, the legal status and rights of undocumented migrants, the ownership of rights of legal persons in the IAHRS, the environment and human rights, among others, and is studying three more on climate change, the role of corporations in the use of firearms, and the rights of future generations.

### **3.2. Contentious function.**

Within the framework of this jurisdiction, the IACHR Court determines whether a State that has accepted its jurisdiction in light of Article 62 of the American Convention has incurred international responsibility for the violation of any of the rights enshrined in that and other inter-American treaties. There are three prior and fundamental issues for the IACHR Court to be able to exercise its contentious jurisdiction: the first is the consent of the States to submit to its jurisdiction. The second is the exclusive procedural legitimacy of the IACHR to submit a case before the Inter-American Court. And, the third is the exhaustion of the procedure before the IACHR. The contentious procedure before the IACHR Court is divided into two phases: the contentious phase and the phase of supervision of compliance with judgments. The contentious phase, in turn, comprises six stages: the initial written stage; the oral or public hearing and reception of statements; the written stage of arguments and final observations of the parties and the IACHR; the evidentiary proceedings; the stage of study and issuance of judgments; and the stage of requests for interpretation.

#### **3.2.1. The litigation phase**

The initial written stage begins with the submission of the case by the IACHR. Once received, the presidency of the IACHR conducts a preliminary examination to verify whether it meets the requirements and then notifies the respondent State and the alleged victim and his or her representatives. When the case is notified, all parties are granted a non-extendable period of two months, counted from the notification of the filing of the IACHR application, to autonomously submit their Brief of Requests, Arguments and Evidence (hereinafter "ESAP"). This is the



most important document in the process, since it describes the facts that violate human rights, the evidence, the persons who will testify and provide expert opinions, and their respective objects of their testimony, and the claims, including those referring to reparations and costs. The respondent State, once it is notified of the ESAP, has a period of two months as of its receipt, to submit the Response to the briefs submitted by the IACHR and the victims and their representatives.

In the event that the State makes a partial or total acknowledgment of responsibility for the facts denounced, the IACHR will grant the IACHR and the victims' representatives a period of time to submit the pertinent observations. Finally, any interested person or institution may submit an *amicus curiae* brief to the Inter-American Court with its opinion regarding some aspect of a case in order to collaborate in its resolution. The oral or public hearing stage begins with the presentation by the IACHR in which it sets out the grounds for its claim. Then the persons who will testify and render expert opinions are called and will be questioned by the parties and the judges. Subsequently, the parties will present their arguments on the merits of the case and the presidency of the IACHR will give them the opportunity to make a reply and a rejoinder. After that, the IACHR will present its concluding observations and the judges will be able to ask final questions to all parties. Generally, the hearing lasts a day and a half, and is transmitted online through the IACHR Court's digital media.

The written stage of arguments and final observations of the parties and the IACHR begins with a resolution requesting the parties to submit their final arguments in writing. The evidentiary stage implies that the IACHR has the power to request or procure, *ex officio* at any stage of the case, any evidence it deems useful and necessary; to require any evidence, explanation or statement that may be useful; to request any organ or authority to obtain information, express an opinion or issue an opinion on a particular aspect; or to commission one or more of the judges to carry out any investigative measure. The stage of study and issuance of judgments includes the presentation of a draft judgment to the plenary of the IACHR Court, which will be subject to deliberation and final vote in private. The judges may issue a reasoned concurring or dissenting vote within the period established by the presiding judge. The judgment is notified by the

Executive Secretariat to all parties. The judgment of the IACHR Court is final and unappealable and may only be interpreted at the request of the parties.

### **3.2.2. The phase of supervision of compliance with sentences.**

In this second phase, the IACHR supervises compliance with its judgments in order to ensure that the reparations ordered are effectively implemented and complied with. It does so through the following mechanisms: (a) in the judgment itself, it establishes that the State must present a first compliance report within one year; (b) it issues compliance resolutions; (c) it holds hearings and conducts proceedings in the territory of the State in question; (d) it appoints country rapporteurs; (e) it publishes the information regarding compliance with the guarantees of non-repetition that is presented during the stage of supervision of compliance with its judgments.

Right to consultation  
and free, prior and informed  
**consent,**  
free prior and informed consent

